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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NORTHSTAR FINANCIAL ADVISORS,
INC., on behalf of itself and all others
similarly situated.

Case No. Case No. 5:08-cv-04119-LHK

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR CLASS
CERTIFICATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 21, 2016

Time: 1:30

Courtroom: 8, 4th Floor, San Jose

Judge: Honorable Lucy H. Koh

SCHWAB INVESTMENTS; MARIANN BYERWALTER, DONALD F. DORWARD, WILLIAM A. HASLER, ROBERT G. HOLMES, GERALD B. SMITH, DONALD R. STEPHENS, MICHAEL W. WILSEY, CHARLES R. SCHWAB, RANDALL W. MERK, JOSEPH H. WENDER and JOHN F. COGAN, as Trustees of Schwab Investments; and CHARLES SCHWAB INVESTMENT MANAGEMENT, INC.,

Date: April 21, 2016

Time: 1:30
Courtroom: 8, 4t

Judge: Honorable Lucy H. K.

Defendants.

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**NOTICE OF MOTION FOR CLASS CERTIFICATION
(Pursuant to Civil Local Rule 7-2)**

TO MARIANN BYERWALTER, DONALD F. DORWARD, WILLIAM A. HASLER,
ROBERT G. HOLMES, GERALD B. SMITH, DONALD R. STEPHENS, MICHAEL W.
WILSEY, CHARLES R. SCHWAB, RANDALL W. MERK, JOSEPH H. WENDER and
JOHN F. COGAN, as TRUSTEES OF SCHWAB INVESTMENTS; CHARLES SCHWAB
INVESTMENT MANAGEMENT, INC., and THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on April 21, 2016, at 1:30 PM or as soon thereafter as the matter may be heard, in Courtroom 8, Fourth Floor, Plaintiff Northstar Financial Advisors, Inc. (“Northstar”) will move this Court to enter an Order:

(1) Certifying this action as a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons who either (i) owned shares of Schwab Total Bond Market Fund (the “Fund”) as of August 31, 2007 (the “Pre-Breach Class”) and/or (ii) acquired those shares at any time from September 1, 2007 through February 27, 2009 (the “Breach Class”), and who were damaged as a result of the Fund’s deviation from its stated fundamental investment policies. Excluded from the Class are the defendants herein, any subsidiaries or affiliates of the defendants in which defendants or their affiliates have a controlling ownership interest, officers and directors of any of the defendants, heirs, successors and assigns of any of the defendants or their officers and directors, and any entity in which any defendant has a controlling ownership interest.

(2) Amending Northstar's Fourth Amended Class Action Complaint [Dkt. No. 214] pursuant to Federal Rules of Civil Procedure 15(a), 21 and 23 to add Paragraph 29a to the Complaint alleging that "Plaintiff Odessa Hall, a client of Northstar, purchased 14,011.799 shares in the Fund on August 2, 2002, and purchased additional Fund shares during the Pre-Breach and Breach Periods, and thus owned 17,352.02 shares in the Fund (net of sales) as of April 1, 2008."; and to provide that "[a]ll other allegations and claims in the Complaint alleged on behalf of plaintiff Northstar are deemed to be amended so as to be also alleged on behalf of plaintiff Hall."

(3) Appointing Northstar and Odessa Hall as class representatives on behalf of the Class; and

(4) Appointing the law firms of Wolf Popper LLP and Greenbaum Rowe, Smith & Davis LLP as lead counsel for the Class and Berman DeValerio as liaison counsel for the Class.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities In Support Thereof, Declarations of Richard Berse, Odessa Hall, Steven W. Kohlhagen and Robert C. Finkel, a proposed order, and the pleadings and papers on file in this action, and such other written or oral argument as may be presented before the motion is taken under submission by the Court.

STATEMENT OF ISSUES

11 1. Whether this Court should certify a class (the “Class”), pursuant to Fed. R. Civ.
12 P. 23(a) and 23(b)(3), on Northstar’s claims for breach of fiduciary duties, and for aiding and
13 abetting the breach of fiduciary duties, defined as all persons who either (i) owned shares of the
14 Schwab Total Bond Market Fund (the “Fund”) as of August 31, 2007 (the “Pre-Breach Class”)
15 and/or (ii) acquired Fund shares at any time from September 1, 2007 through February 27,
16 2009 (the “Breach Class”), and who were damaged as a result of the Fund’s deviation from its
17 stated fundamental investment policies, when each of the elements of Northstar’s claims can be
18 proven by common evidence and the criteria of Rules 23(a) and 23(b)(3) are clearly
19 established.

20 2. Whether this Court should appoint Northstar as a class representative of the
21 Class, when Northstar has actively pursued this litigation for over seven years and is a
22 sophisticated, engaged and typical class member.

23 3. Whether this Court should designate Odessa Hall as an additional class
24 representative plaintiff, when she had a substantial and direct investment in the Fund at the time
25 of the breach (approximately \$170,000), has claims that are typical and in common with other
26 class members, and is dedicated to the successful prosecution of this action.

1 **PRELIMINARY STATEMENT**

2 This action is particularly well-suited for certification as a class action.

3 Defendants are the Trustees of Schwab Investments, (the Trust that controls the assets
 4 of the Schwab Total Bond Market Fund (the “Fund”)) and Charles Schwab Investment
 5 Management, Inc. (the “Advisor”), the advisor to the Fund. Plaintiff Northstar is an investment
 6 advisory firm and the assignee of claims against the defendants from one of its investment
 7 clients (Henry Holz). Holz is a direct investor in shares of the Fund and was damaged by
 8 defendants’ misconduct alleged in this action.¹

9 Northstar’s claims against defendants for breach of their fiduciary duties to cause the
 10 Fund to adhere to its fundamental investment policies require proof of only (i) the existence of
 11 a fiduciary relationship, (ii) a breach of that fiduciary relationship, (iii) a causal connection
 12 between defendants’ alleged fiduciary duty breaches and plaintiffs’ damages, and (iv) damages.
 13 Those fundamental investment policies required the Fund to “attempt to provide a high level of
 14 current income consistent with preservation of capital by seeking to track the investment results
 15 of [the Lehman Brothers U.S. Aggregate Bond Index (“the Bond Index”)] through the use of an
 16 indexing strategy,” and not concentrate more than 25% of the Fund’s portfolio in any one
 17 industry. Defendants breached the Fund’s fundamental investment objectives by causing the
 18 Fund to concentrate in excess of 25% of the Fund’s portfolio in non-U.S. agency collateralized
 19 mortgage obligations (“CMOs”) that were not part of the Bond Index and were substantially
 20 more risky than securities that were part of the Bond Index. Similarly, plaintiffs’ claims for
 21
 22

23 ¹ On three separate occasions, either this Court or the Ninth Circuit Court of Appeals has
 24 sustained the effectiveness of the assignments to provide Northstar with standing to pursue
 25 Holz’s claims on a class-wide basis. *See Northstar Financial Advisors, Inc. v. Schwab*
Investments, 609 F. Supp. 2d 938, 942 (N.D. Cal. 2009) (“The assignment of claims from one
 26 of Northstar’s clients would ... cure this deficiency.”); 781 F. Supp. 2d 926, 932-33 (N.D. Cal.
 27 2011) (“Defendants do not dispute that plaintiffs’ assignment conferred standing when it was
 28 executed.... [Plaintiff’s] supplemental pleading established plaintiffs’ standing to sue based on
 the asserted assignment of claim.”); 779 F. 3d 1036, 1048 (9th Cir. 2015) (“we agree that Judge
 Koh did not abuse her discretion in permitting Northstar to file a supplemental pleading after a
 post-complaint assignment from a party that clearly had standing”). Further, the United States
 Supreme Court has denied *certiorari* on Northstar’s use of the assignment to provide standing.
 136 S. Ct. 240 (2015).

1 aiding and abetting breaches of fiduciary duty require proof of only the aider and abettor's
 2 (i) knowledge of another's breach of fiduciary duty and (ii) active participation in that breach.

3 Both claims already have been sustained as to each sub-class following defendants'
 4 motions to dismiss by the Ninth Circuit and this Court based on the allegations in Northstar's
 5 Fourth Amended Class Action Complaint ("4AC") (Dkt. No. 214). *See Northstar Financial*
 6 *Advisors, Inc. v. Schwab Investments*, 779 F.3d at 1056-62 (9th Cir. 2015) and this Court's
 7 October 5, 2015 decision [Dkt No. 229, at *23-27].

8 Moreover, plaintiff Northstar is well-suited to be appointed as a class representative. It is
 9 a sophisticated and engaged class representative that identified defendants' breach of fiduciary
 10 duties, brought them to the attention of counsel with instructions to commence litigation to cause
 11 defendants to comply with the Fund's fundamental investment objectives and to recover
 12 damages on behalf of class members, and has vigorously prosecuted this case for seven years,
 13 including through two appeals.

14 Although Northstar alone is an (exceptionally) adequate class representative, because
 15 defendants have continued to dispute the enforceability of the assignment of Holtz's claims,
 16 Northstar proposes that the Court add Odessa Hall, another of Northstar's clients, as an
 17 additional class representative plaintiff. *See* accompanying Declaration of Odessa Hall In
 18 Support of Plaintiff's Motion for Class Certification (the "Hall Decl.").² Ms. Hall made her
 19 first investment of \$142,500 in the Fund in 2002 and incurred damages of approximately
 20 \$9,600 from defendants' breaches of fiduciary duty. Ms. Hall is fully familiar with the issues
 21 in this lawsuit and would make an exceptional class representative. *Id.*

22 Accordingly, the proposed Class should be certified and Northstar and Ms. Hall should
 23 be designated as class representatives.

24
 25
 26 ² Plaintiffs' proposed order granting the motions to amend the complaint and to certify the
 27 Class provides for the 4AC to be amended by Order of this Court to allege in ¶29a thereof that
 28 "Plaintiff Odessa Hall, a client of Northstar, purchased 14,011.799 shares in the Fund on
 August 2, 2002 and purchased additional shares during the Pre-Breach and Breach Periods, and
 thus owned 17,352.02 shares in the Fund (net of sales) as of April 1, 2008."

1

2 **STATEMENT OF FACTS**

3 **A. The Parties**

4 This action is brought by plaintiff Northstar individually, and on behalf of persons who
 5 either (i) owned shares of the Schwab Total Bond Market Fund (*i.e.*, the “Fund”) as of
 6 August 31, 2007 (the “Pre-Breach Class”) and/or (ii) acquired Fund shares at any time from
 7 September 1, 2007 through February 27, 2009 (the “Breach Class”), and who were damaged as
 8 a result of the Fund’s deviation from its stated fundamental investment policies. 4AC ¶ 1.

9 The trustee-defendants are Trustees of Schwab Investments (the “Trust”). The Trust is
 10 the sponsor (as of September 21, 2009) of a series of 94 Schwab-related mutual funds,
 11 including the Fund. Schwab Investment Management, Inc. (*i.e.*, the “Advisor”) is the
 12 investment advisor to each of those 94 mutual funds, including the Fund. 4AC ¶ 3. The
 13 Advisor is responsible for managing the Fund’s assets (and the assets of the other 93 mutual
 14 funds) pursuant to an Investment Advisory and Administration Agreement (“IAA”) dated June
 15 15, 1994 [Dkt No. 152-4]. *Id.*

16 **B. The Fund Establishes Its Fundamental Investment Objectives**

17 1. **The Government Bond Fund**

18 The Fund was initiated by the Trust on March 5, 1993 under a predecessor name, the
 19 Schwab Long-Term Government Bond Fund, as an actively managed U.S. Government bond
 20 fund. The “investment objective” of the Government Bond Fund was “to provide a high level
 21 of current income consistent with preservation of capital by investing primarily in securities
 22 issued or guaranteed by the United States Government, its agencies or instrumentalities and
 23 repurchase agreements covering those securities.” This “investment objective . . . [was]
 24 fundamental and [could not] be changed without approval by holders of a majority of the
 25 Fund’s outstanding voting shares.” 4AC ¶¶ 78-80.

26 2. **The Index Fund Is Created To Attract New Investors**

27 Schwab was unsuccessful in marketing the Government Bond Fund. 4AC ¶ 81. As of
 28 August 31, 1997, after more than four years of operations, the Government Bond Fund had

1 only \$24.8 million in investment assets. 4AC ¶ 82. Hence, pursuant to the July 25, 1997 Proxy
 2 Statement (the “Proxy Statement”) (Dkt No. 218-1), the Trust sought a shareholder vote to
 3 amend the Government Bond Fund’s fundamental investment objectives. 4AC ¶ 83. In
 4 Proposal No. 2 of the Proxy Statement, the Board of Trustees of the Trust proposed to amend
 5 the Fund’s fundamental investment objective so that rather than operating as an actively
 6 managed government bond fund, the Fund would “attempt to provide a high level of current
 7 income consistent with preservation of capital by *seeking to track the investment results of a*
 8 *particular bond index through the use of an indexing strategy.*” 4AC ¶ 84 (quoting 1997 Proxy
 9 Statement [Dkt. No. 218-1] at 17) (emphasis added). The Proxy Statement identified that bond
 10 index as the “Lehman Brothers Aggregate Bond Index.” *Id.* (citing the Proxy Statement at 16-
 11 17).³

12 Proposal 2 provided that, if approved, the Fund’s new “fundamental investment
 13 objective” would only be changeable by shareholder vote. 4AC ¶ 85 (Proxy Statement at 24).

14 The Proxy Statement described in detail the “investment process of indexing” and
 15 proposed “indexing strategy”:

16 If the proposed investment objective is approved, the Funds would not be
 17 managed according to traditional methods of “active” investment management,
 18 which involve the buying and selling of securities based upon economic,
 19 financial, and market analyses and investment judgment. Instead, the Investment
 20 Manager would utilize a “passive” or “indexing” investment approach, to attempt
 21 to track the investment performance of each Fund’s Index through statistical
 22 sampling and other procedures. The Funds would be unable to hold all of the
 23 individual issues which comprise the Indexes because of the large number of
 24 securities in the Indexes. Each Fund would hold a portfolio of fixed-income
 25 securities that is managed to closely approximate its Index’s “characteristics” of
 26 coupon rate, duration, sector, quality and optionality (or convexity). 4AC ¶ 88
 27 (citing the Proxy Statement at 22).

28 The Proxy Statement further emphasized that the Fund’s “indexing strategy” required
 29 that “[b]efore purchasing or selling a security, the [Advisor] would analyze each security’s
 30 characteristics and determine whether purchasing or selling the security would help the Fund’s

3 The Lehman Index [subsequently renamed Barclays] was described in the Proxy Statement as
 4 “a broad market-weighted index which encompasses . . . U.S. Treasury and agency securities,
 5 corporate bonds, international (dollar-denominated) bonds, agency mortgage-backed securities,
 6 and asset-backed securities, all with maturities greater than one year.” 4AC ¶ 86 (citing Proxy
 7 Statement at 18).

1 portfolio approximate the characteristics of the Index.” 4AC ¶ 89 (citing the Proxy Statement
 2 at 22).

3 The Proxy Statement also proposed a change (Proposal No. 3) in the Fund’s
 4 “fundamental investment policies and investment restrictions” regarding concentration of
 5 investments. 4AC ¶¶ 91-92 (citing Proxy Statement at 32). Proposal No. 3 was expressly
 6 intended to incorporate the SEC’s interpretation of the term “concentration” as used in the
 7 Investment Company Act of 1940 (which at the time was and remains 25%). 4AC ¶¶ 92-93
 8 (Proxy Statement at 32-33).

9 As reported by the Trust in a Prospectus Supplement dated September 25, 1997, by
 10 majority vote, the Fund’s shareholders approved Proposal Nos. 2 and 3, including the
 11 “[a]mendment of [the] Fund’s fundamental investment objective resulting in changing [the]
 12 Fund from a Government bond fund to a bond index fund that would include Government and
 13 other fixed income securities.” 4AC ¶ 95. The Prospectus Supplement emphasized that “[a]s a
 14 result of the shareholder vote, each Fund’s fundamental investment objective is amended to
 15 allow each Fund to pursue an indexing strategy:”

16 As a result of the amendment referenced in Item No. 1 above, as of November 1,
 17 1997, the name of the ... Schwab Long-Term Government Bond Fund will be
 18 changed to the Schwab Total Bond Market Index Fund. As a result of the
 19 shareholder vote, [the] Fund’s fundamental investment objective is amended to
 20 allow [the] Fund to pursue an indexing strategy. ... Schwab Total Bond Market
 21 Index Fund will seek to track the Lehman Brothers Aggregate Bond Index. The
 22 index is market-weighted and designed to track the performance of broad
 23 segments of the bond market. 4AC ¶ 96.

24 The Proxy Statement imposed detailed obligations on the Trustees of the Trust and the
 25 Advisor on how the Fund would be managed. 4AC ¶ 97 (Proxy Statement at 22-23). The
 26 Proxy Statement also created voting rights on behalf of the Fund’s existing and future
 27 shareholders under which the investment objectives and fundamental policies of the Fund could
 28 not be changed thereafter without a majority shareholder vote. *Id.* The adoption of the
 29 changed fundamental investment objectives significantly restricted the discretion conferred on
 30 the Trustees and the Advisor to manage the Fund and its assets. 4AC ¶ 98. The Fund’s
 31 subsequent registration statements and prospectuses reflected the adoption of these restrictions.

1 *Id.* See also accompanying Declaration of Steven W. Kohlhagen In Support of Motion for
 2 Class Certification (the “Kohlhagen Decl.”), ¶¶ 22-23 and Ex. D.

3 **C. The Fund Deviates From Its Fundamental Investment Objectives**

4 From August 31, 1997 through August 31, 2007, an investment in the Fund
 5 substantially performed in a manner that was consistent with the Index, returning an annualized
 6 rate of 5.75% compared to 6.04% for the Index. 4AC ¶ 108; Kohlhagen Decl., ¶26, Exhibit K.
 7 The Index Fund’s net assets increased from \$24 million as of August 31, 1997 to approximately
 8 \$1.5 billion as of August 31, 2007 – a period over which the Trust, the Trustees and the
 9 Schwab Advisor managed the Fund to track the Index using an indexing strategy. 4AC ¶ 109.

10 By late August 2007, the Fund began improperly deviating from its stated fundamental
 11 investment policies by purchasing high risk CMOs. 4AC ¶¶ 110, Kohlhagen Decl., ¶ 32, Ex.
 12 N. As of August 31, 2007, thirty-seven percent (37.0%) of the total assets of the Fund was
 13 invested in non-agency CMOs. *Id.* From August 31, 2007 through February 27, 2009, an
 14 investment in the Fund underperformed the Index by 12.64%. 4AC ¶ 111; Kohlhagen Decl., ¶¶
 15 29-31; Exhibit M. The CMOs purchased for the Fund’s portfolio violated the Fund’s
 16 investment objectives, as they were not issued by government agencies. 4AC ¶ 112. Rather,
 17 they were issued by financial institutions through subsidiaries and backed by residential loans
 18 that did not conform to the agencies’ high loan underwriting requirements. *Id.*; Kohlhagen
 19 Decl. ¶¶ 33-35, Exhibits N and O and Dkt No. 225-1. Moreover, non-agency CMOs purchased
 20 by the Advisor for the Fund represented tranches of mortgage-backed securities, such as
 21 principal only or interest only payments, and were significantly more risky than the agency-
 22 issued mortgage-backed securities that were authorized under the Index. 4AC ¶ 113;
 23 Kohlhagen Decl., ¶ 35. Included in the Fund’s portfolio were CMOs sponsored by such
 24 subprime lenders as Citigroup, Merrill Lynch, Countrywide, Bear Stearns, IndyBank, Lehman,
 25 and Washington Mutual. *Id.*

26 The investment of 37% of the Fund’s assets in such mortgage-backed securities not
 27 only violated the Fund’s indexing policies, but also violated the Fund’s stated investment
 28 objective forbidding the concentration of more than 25% of the Fund’s assets in any one

1 industry (except as required by the Index). 4AC ¶ 114. Concomitantly, the Fund's investment
 2 in non-agency CMOs as of August 31, 2007 also violated shareholders' voting rights, as set
 3 forth in the Proxy Statement, as it constituted a derogation from the Fund's fundamental
 4 investment objective to "seek to track" the Index "through the use of an indexing strategy" that
 5 could not be changed absent shareholder approval. 4AC ¶ 115. The non-agency CMOs
 6 maintained by the Index Fund as of August 31, 2007 did not "closely approximate" the
 7 "characteristics" of the securities in the Lehman Index, as was required once the Fund's
 8 shareholders approved Proposal Nos. 2 and 3 in the Proxy Statement. *Id.*; Proxy Statement at
 9 22.

10 In a February 19, 2009 decision, the District Court (per Hon. Susan Illston), concluded
 11 that "Northstar's allegations are sufficient to state a claim that the Fund's significant
 12 investments in non-agency CMOs violated the Fund's investment objective." 609 F. Supp. 2d
 13 at 946.

14 By on or about February 27, 2009, subsequent to the filing of this action, defendants
 15 reverted back to the Fund's fundamental investment policy of seeking to track the Lehman
 16 Index through an indexing strategy. 4AC ¶ 9. Since February 27, 2009, the Fund's assets and
 17 performance have substantially tracked the composition and performance of the Index. 4AC ¶
 18 10.

19 The Fund's investment in non-agency CMOs as of August 31, 2007, in light of all
 20 circumstances, was speculative, irresponsible and a gross deviation from the Fund's
 21 fundamental investment objectives and policies, and represented clear breaches of defendants'
 22 fiduciary duties. 4AC ¶ 120.

23 **D. Northstar Brings Suit; Other Relevant Procedural History**

24 Northstar is a registered investment advisory and financial planning firm that manages
 25 both discretionary and nondiscretionary accounts on behalf of investors in its role as an
 26 investment advisor. 4AC ¶¶23-24. As of August 31, 2007, Northstar had approximately
 27 240,000 shares of the Fund under its management. 4AC ¶ 27. *See* accompanying Declaration
 28 of Richard Berse In Support of Motion for Class Certification (the "Berse Decl."); ¶ 7, and Ex.

1 A. Northstar filed this shareholder class action against the Trust and the Advisor in August
2 2008, alleging they deviated from the Fund's fundamental investment policies and exposed the
3 Fund and its shareholders to tens of millions of dollars in losses. Dkt No. 3-1. Northstar's
4 original complaint sought monetary damages and injunctive relief.

5 Henry Holz, a client of Northstar, began purchasing shares in the Fund on February 7,
6 2007. 4AC ¶ 29. He originally owned 3,932.927 shares, and with additional monthly dividend
7 reinvestments, came to own 4,181.043 shares in the Fund as of April 1, 2008. *Id.*⁴ By way of
8 an assignment dated December 8, 2008 (the “Assignment”), Holz assigned to Northstar “all of
9 the Assignor’s right, title and interest in any claim that the Assignor has or could have against
10 Schwab Investments, Charles Schwab & Co., Inc., Charles Schwab Investment Management,
11 Inc. and Schwab Total Bond Market Fund” 4AC ¶ 29. *See* Berse Decl., Ex. B. The
12 Assignment was amended on September 28, 2010 to include claims asserted against the
13 Trustees of Schwab Investments. *Id.*, Ex. C.

14 After various motions to dismiss, two appeals to the Ninth Circuit, and three
15 amendments to the complaint, Northstar filed its Fourth Amended Complaint on June 25, 2015
16 [Dkt No. 214]. After further motion practice as to the Fourth Amended Complaint, Northstar
17 has surviving causes of action for breaches of fiduciary duty and aiding and abetting breaches
18 of fiduciary duty. These claims are contained in the First through Fourth and the Eighth
19 through Eleventh Causes of Action (4AC, ¶¶ 124-57 (investors who purchased during the Pre-
20 Breach Period prior to August 31, 2007); and ¶¶ 194-227 (investors who purchased during the
21 Breach Period beginning on or about August 31, 2007)).

22 Northstar now moves to certify the Pre-Breach Class and the Breach Class.

ARGUMENT

THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF FED. R. CIV. P 23

Rule 23 of the Federal Rules of Civil Procedure, which governs class certification, has two sets of distinct requirements that plaintiffs must meet before this Court may certify the

²⁸ ⁴ A schedule of Holz's transactions in the Fund is annexed as part of Exhibit A to the Berse Decl.

1 proposed class. Plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy at
 2 least one of the prongs of Rule 23(b). *See Pulaski & Middleman, LLC v. Google, Inc.*,
 3 802 F.3d 979 (9th Cir. 2015) (reversing denial of class certification).

4 Under Rule 23(a), this Court may certify a class where “(1) the class is so numerous
 5 that joinder of all members is impracticable; (2) there are questions of law or fact common to
 6 the class; (3) the claims or defenses of the representative parties are typical of the claims or
 7 defenses of the class; and (4) the representative parties will fairly and adequately protect the
 8 interests of the class.” Fed. R. Civ. P. 23(a).

9 Upon satisfying the requirements of Rule 23(a), this Court must then determine whether
 10 plaintiffs have satisfied “through evidentiary proof” one of the three subsections of Rule 23(b).
 11 *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013). Plaintiffs are seeking certification
 12 under Rule 23(b)(3), which permits class certification if the Court finds that “questions of law
 13 or fact common to class members predominate over any questions affecting only individual
 14 members, and that a class action is superior to other available methods for fairly and efficiently
 15 adjudicating the controversy.”

16 “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the
 17 certification stage.” *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1179
 18 (N.D. Cal. 2013) quoting *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184,
 19 1194-95 (2013). “If a court concludes that the moving party has met its burden of proof, then the
 20 court has broad discretion to certify the class.” *Id.*

21 **A. The Proposed Class Meets the Requirements of Rule 23(a)**

22 **1. An Ascertainable Class Exists**

23 “As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party
 24 seeking class certification must demonstrate that an identifiable and ascertainable class exists.”
 25 *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011). A class is adequately defined
 26 and ascertainable if it is “administratively feasible for the court to ascertain whether an
 27 individual is a member.” *O’Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal.
 28 1998). For example, class certification is appropriate where “defendants’ business records

1 should be sufficient to determine the class membership status of any given individual.”

2 *Hofstetter v. Chase Home Fin., LLC*, No. 10-1313, 2011 U.S. Dist. LEXIS 38124, at *42 (N.D.
3 Cal. Mar. 31, 2011).

4 Here, putative class members can readily be identified through defendants’ business
5 records. Thus, the proposed class is ascertainable.

6 **2. The Proposed Classes Are So Numerous That Joinder is
7 Impracticable**

8 Under Rule 23(a)(1), a proposed class must be “so numerous that joinder of all
9 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “‘Impracticability’ does not mean
10 ‘impossibility,’” but rather calls on the court to consider the difficulty or inconvenience of
11 joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909,
12 913-14 (9th Cir. 1964).

13 As of August 31, 2007, the Fund had over 157 million shares outstanding. *See* Dkt No.
14 227-2 at 47. Northstar itself held 240,000 shares of the Fund as of August 31, 2007 (far less
15 than 1% of the shares of the Fund), distributed among 101 client accounts. Berse Decl., Ex. A.⁵
16 Thus, it is reasonable to assume that the shares of the Fund were held by well in excess of
17 1,000 investors. Thus, the numerosity component of Rule 23(a) is plainly satisfied.

18 **3. Plaintiffs’ Claims Involve Common Questions of Law or Fact**

19 “Commonality requires the plaintiff to demonstrate that the class members ‘have
20 suffered the same injury,’” which “does not mean merely that they have all suffered a violation
21 of the same provision of law.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)
22 (internal citation omitted). The “claims must depend upon a common contention” and “[t]hat
23 common contention . . . must be of such a nature that it is capable of classwide resolution.” *Id.*
24 Commonality is satisfied by “the existence of shared legal issues with divergent factual
25 predicates” or a “common core of salient facts coupled with disparate legal remedies within the
26 class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20 (9th Cir. 1998). All issues of fact
27 and law do not need to be common to satisfy the rule. *Id.* Rather, there need only be one

28 ⁵ Some clients held shares in multiple accounts. *See* Berse Decl., Exh. A.

1 question of fact or law common as between the members of the proposed class. *Rodriguez v.*
 2 *Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (citation omitted).

3 Here, there are *several* questions of law or fact common among the claims of class
 4 members. The overarching one is whether defendants breached their fiduciary duties to
 5 plaintiffs and the proposed class members in deviating from the Fund’s fundamental investment
 6 objective “to track the investment results of a particular bond index through the use of an
 7 indexing strategy.” *See* 4AC ¶ 76. This common question calls for an analysis of the elements
 8 of a breach of fiduciary duty and the application of common facts to those elements. Such
 9 analysis demonstrates that the commonality requirement is satisfied in this case.

10 “The elements of breach of fiduciary duty are: (1) existence of a duty that is fiduciary
 11 in nature based upon the relationship of the parties, (2) breach of that duty, (3) damages, and
 12 (4) a causal connection between breach of the duty and the damages.” *Ward v. Costello*, 2002
 13 Mass. Super. LEXIS 545, at *22 (Mass. Super. Ct. Dec. 17, 2002) (citing *Hanover Ins.*
 14 *Company v. Sutton*, 46 Mass. App. Ct. 153, 164 (1999)). To prove a claim of aiding and
 15 abetting a breach of fiduciary duty, a plaintiff “must show that the defendant knew of the
 16 breach [of fiduciary duty] and actively participated in it such that he or she could not
 17 reasonably be held to have acted in good faith.” *Spinner v. Nutt*, 417 Mass. 549, 556 (1994)
 18 (citing *Banks v. Everett Nat'l Bank*, 305 Mass. 178, 182 (1940)).

19 With respect to their claims for breach of fiduciary duty, Northstar and Hall easily meet
 20 their burden of demonstrating “that the class members ‘have suffered the same injury’ and that
 21 the common questions are of sufficient importance to the case ‘that determination of [their]
 22 truth or falsity will resolve an issue that is central to the validity of each one of the claims in
 23 one stroke.’” *See Buffalo Laborer Sec. Fund v. J.P. Jeanneret Assocs.*, 09 Civ. 8362 (LBS),
 24 2012 U.S. Dist. LEXIS 63549, at *15-16 (S.D.N.Y. May 3, 2012) (quoting *Dukes*, 131 S. Ct. at
 25 2550-51) (finding commonality satisfied in class certification motion because plaintiff was able
 26 to show common questions of law or fact will determine each element of plaintiff’s claim for
 27 breach of fiduciary duty under ERISA); *Haddock v. Nationwide Fin. Servs.*, 293 F.R.D. 272,
 28 286 (D. Conn. 2013) (the questions of law raised by the trustees—whether Nationwide

1 Financial Services, Inc., breached its fiduciary duties to the qualified ERISA pension benefit
 2 plans and participants—were applicable to each member of the putative class, thus satisfying
 3 the commonality requirement).

4 Plaintiffs will demonstrate, through common facts and expert testimony: (1) that
 5 defendants owed fiduciary duties to plaintiffs and the putative class members; (2) defendants
 6 breached their fiduciary duties in deviating from the Fund’s fundamental investment objective
 7 to track the Index through the use of an indexing strategy and instead imprudently invested in
 8 high risk CMOs; (3) plaintiffs and the putative class members suffered damages as a result of
 9 this breach because the Fund underperformed the Index by 12.64%; and (4) it was defendants’
 10 decision to invest in high risk CMOs that caused the Fund to underperform the Index by
 11 12.64%. If one or more class members brought suit individually, they would raise the same
 12 legal claim. Plaintiffs will also show through common facts that all defendants knew of the
 13 breaches being committed, therefore supporting the added claim of aiding and abetting. In fact,
 14 the Ninth Circuit and this Court have already sustained Northstar’s claims for breach of
 15 fiduciary duty and aiding and abetting the breach based on the common allegations contained in
 16 the 4AC. *See Northstar Financial Advisors, Inc. v. Schwab Investments*, 779 F.3d at 1056-62
 17 (9th Cir. 2015) and the District Court’s decision dated October 5, 2015 [Dkt No. 229], at pages
 18 23-27.

19 **3. Plaintiffs’ Claims Are Typical of the Members of the Class**

20 Under Rule 23(a)(3), the class representative must have claims or defenses that are
 21 “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is met
 22 “when each class member’s claim arises from the same course of events, and each class member
 23 makes similar legal arguments to prove the defendant’s liability.” *Rodriguez*, 591 F.3d at 1124
 24 (internal citations omitted). This requirement is permissive and requires only that the
 25 “representative’s claims are ‘typical’ if they are reasonably co-extensive with those of absent
 26 class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020; *Trosper v.*
 27 *Styker Corp.*, No. 13-CV-0607-LHK, 2014 U.S. Dist. LEXIS 117453, at *38 (N.D. Cal. Aug. 21,
 28 2014).

1 The claims of Northstar and Hall are typical of the members of the putative class
 2 because their monetary losses and those of absent class members derive from the same course
 3 of defendants' conduct. Northstar alleges, as do all the putative class members, that defendants
 4 breached their fiduciary duty in deviating from the Fund's stated fundamental investment
 5 objectives. Northstar obtained the Assignment from Holz, who owned 4,181.043 shares of the
 6 Fund prior to selling his interest. Hall was a direct investor in the Fund. Regardless of when
 7 Northstar, Hall, and the members of the putative class first acquired and then ultimately
 8 divested themselves of their interests in the Fund during the period August 31, 2007 through
 9 February 27, 2009, "each class member's claim arises from the same course of events, and each
 10 class member makes similar legal arguments to prove the defendant's liability." *See*
 11 *Rodriguez*, 591 F.3d at 1124.

12 Where, as here, the class representatives' interests align with those of the putative class,
 13 the typicality requirement is met.

14 **4. Northstar and Hall Satisfy the Adequacy of Representation
 15 Requirement**

16 Rule 23(a)(4) permits class certification only if the "representative parties will fairly
 17 and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In the Ninth Circuit,
 18 a court considers two questions in determining the adequacy of class representatives: "(1) do
 19 the representative plaintiffs and their counsel have any conflicts of interest with other class
 20 members; and (2) will the representative plaintiffs and their counsel prosecute the action
 21 vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. Wash.
 22 2003) (citing *Hanlon*, 150 F.3d at 1020). Here, plaintiff Northstar seeks appointment as a class
 23 representative and to have the Court appoint Hall as an additional representative. *See* Manual
 24 for Complex Litigation (Fourth), §21.26 (citing *In re Electronics Pacing Syst., Inc.*, 172
 25 F.R.D. 271, 283 (S.D. Ohio 1997) ("The Court may permit intervention by a new representative
 26 or may simply designate that person as a representative in the order granting class
 27 certification."). *See also Chu v. Wells Fargo Investments, LLC*, No. C 05-04526 MHP, 2009
 28 U.S. Dist. LEXIS 88119, at *4-5 n.1 (N.D. Cal. Sept. 24, 2009) (citing *Electronics*, and

1 observing that “courts have historically permitted the replacement or addition of class
2 representatives simply by amending the complaint.”); *Cobell v. Norton*, 213 F.R.D. 43, 45
3 (D.D.C. 2003) (*quoting* Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 3.42
4 (4th ed. 2002) (“Under Rule 23, the court may . . . invite interventions to bolster or substitute for
5 class representation.”); *Nguyen v. CTS Elecs. Mfg. Sols. Inc.*, 301 F.R.D. 337, 341 (N.D. Cal.
6 2014) *quoting* Fed. R. Civ. P. 21(a) (“On motion or on its own, the court may at any time, on
7 just terms, add or drop a party.”).

8 Northstar's determination to seek to add Hall as a representative plaintiff in this action
9 is in response to defendants' recent and ongoing litigation strategies, and will cause no unfair
10 prejudice to defendants. *See* accompanying Declaration of Robert C. Finkel in Support of
11 Motion for Class Certification.⁶

(a) Northstar, Hall and their counsel possess no conflict of interest with other class members

As assessed under the typicality analysis, Northstar's and Hall's interests are clearly aligned with that of the putative class members. As such, there are no conflicts of interest between plaintiffs and the putative class members. Hall was a direct investor in the Fund and Northstar obtained an Assignment of claims from Henry Holz, a beneficial owner of Fund shares. *See* Berse Decl., ¶ 13; Exs. B and C.

(b) Northstar, Hall, and their counsel will vigorously prosecute this action.

Both Northstar and its counsel have demonstrated their dedication to vigorously prosecuting this action since its inception in 2008, through four amendments to the Complaint, five motions to dismiss, and two appeals to the Ninth Circuit. Richard Berse, the principal of Northstar, has consulted frequently with Greenbaum, Rowe, Smith & Davis LLP and Wolf Popper LLP with respect to litigation strategy, as well as reviewing, and proposing changes to

²⁶ Because Northstar is not seeking to file an amended complaint (while motions addressed to
the existing pleading are pending before the Court), but merely to add a plaintiff as class
²⁷ representative pursuant to order of this Court, it has not appended an amended pleading. See
Local Rule 10-1 (“Any party filing or moving to file an amended pleading must reproduce the
²⁸ entire proposed pleading and may not incorporate any part of a prior pleading by reference.”).

1 Court documents, and demonstrating a willingness to travel from his home in New Jersey to
 2 San Francisco, if necessary, for Court appearances. *Id.*, ¶ 14. Mr. Berse is familiar with the
 3 issues concerning this lawsuit. As for Ms. Hall, she too is familiar with the issues concerning
 4 this litigation, and has demonstrated her willingness and ability to participate in this Action,
 5 including by appearing for depositions or court appearances. Hall Decl., ¶ 11.

6 Additionally, Northstar and Hall have retained counsel who have successfully
 7 prosecuted numerous complex class actions over the past several decades in courts throughout
 8 the country. *See*, resumes attached as Dkt No. 155.

9 **B. The Proposed Class Meets the Requirements of Rule 23(b)(3)**

10 This case also meets the requirements of Rule 23(b)(3) certification. For a class action
 11 to be certified under Rule 23(b)(3), the class representatives must show that “the questions of
 12 law or fact common to the members of the class *predominate* over any questions affecting only
 13 individual members and that a class action is *superior* to other available methods for the fair
 14 and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3) (emphases added).
 15 Here, that the class meets the requisite predominance and superiority are indisputably present.

16 **1. Common Questions of Law or Fact Predominate**

17 “The Rule 23(b)(3) predominance inquiry” is intended to “tes[t] whether proposed
 18 classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The Ninth Circuit has held that “there is clear
 20 justification for handling the dispute on a representative rather than an individual basis” if
 21 “common questions present a significant aspect of the case and they can be resolved for all
 22 members of the class in a single adjudication” *Hanlon*, 150 F.3d at 1022.

23 Plaintiffs seek to certify a class under Rule 23(b)(3) based on claims of breach of
 24 fiduciary duty as to persons who held shares of the Fund over a finite period of time. As
 25 discussed above in the commonality analysis, the issues of law and fact arising from Northstar’s
 26 claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are not only
 27 common as among putative class members, but are the core questions to be resolved, and, as
 28 such predominate over any individual ones. Indeed, plaintiffs’ claims are ideally suited for class

1 treatment because such claims focus on the “conduct of the defendants, not the plaintiffs.” *See*
 2 *In re Northrop Grumman Corp. Erisa Litig.*, CASE NO. CV 06-06213 MMMM (JCx), 2011
 3 U.S. Dist. LEXIS 94451, at *38 (C.D. Cal. Mar. 29, 2011); *Bruhl v. PricewaterhouseCoopers*
 4 *Int'l*, 257 F.R.D. 684, 698 (S.D. Fla. 2008) (granting class certification on breach of fiduciary
 5 duty claims where defendants owed same duty to each class member and breach could be
 6 established on class-wide basis). These claims will require Northstar to demonstrate that each
 7 defendant breached a fiduciary duty to the putative class members, and that such breach was the
 8 proximate cause of Northstar’s losses. The common evidence that will be used to establish these
 9 elements outweighs any individualized issues. *See also Trosper*, 2014 U.S. Dist. LEXIS 117453,
 10 at *29 (“Indeed, the central question in this lawsuit is whether, as Plaintiff contends,
 11 Howmedica’s policy violated Section 2802 by failing to compensate sales representatives for
 12 business expenses..... The answer to that central question will determine the outcome of this
 13 case.”); *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d at 1227 (“Given the
 14 considerable, compelling common proof Plaintiffs have submitted regarding Defendants’ alleged
 15 antitrust violation, as well as the parties’ actions indicating that they will vigorously litigate the
 16 question of whether Defendants engaged in an antitrust violation, this question is likely to be
 17 central to this litigation.”).

18 First, the question whether a fiduciary duty was owed to the members of the class is a
 19 legal one that requires a common analysis and essentially already has been dispository
 20 answered in Northstar’s favor by virtue of the Ninth Circuit’s opinion earlier this year.⁷ As
 21 stated in the Fourth Amended Complaint, “[u]ndeniably, the Schwab Trustees, the Schwab
 22 Trust and the Schwab Advisor owed Class members a fiduciary duty to manage the Fund’s
 23 assets with the care and prudence of a professional in like circumstances and to adhere to the
 24 Fund’s investment objectives and policies.” 4AC ¶ 60. As the District of Connecticut
 25 recognized in *Haddock* in granting a motion for class certification in a breach of fiduciary duty
 26 action under ERISA:

27

28 ⁷ See 779 F.3d at 1050-56.

1 ‘whether Nationwide [Financial Services, Inc.] is a fiduciary and whether it
 2 breached its obligations to the [pension] Plans as a fiduciary can be resolved on
 3 the basis of the characteristics of Nationwide’s contractual relationship with the
 4 plans that are common to the Class. Furthermore, any breach of Nationwide’s
 5 fiduciary obligations will be determined on the basis of conduct that is applicable
 6 to the whole Class.’ [] Thus, because the plaintiffs’ ‘legal and factual theories are
 7 premised on the structural nature of Nationwide’s contractual relationship with
 8 the Plans, which is identical across the Class,’ [] the plaintiffs’ liability case is
 9 particularly well suited for class-wide adjudication.

10 *Haddock*, 293 F.R.D. at 283-84 (internal citations omitted). Here, as the Ninth Circuit
 11 held in this case, the Proxy Statement serves as the contract between the defendants and the
 12 putative class members, and defines the fiduciary obligations owed by defendants to the class
 13 members. See 779 F.3d at 1050-56. No individualized issues exist as to whether defendants
 14 owed the class members the duty of care and prudence, or the parameters of that duty.

15 Second, plaintiffs will demonstrate through common evidence that each defendant
 16 breached their fiduciary duties of care and prudence owed to the putative class members by
 17 failing to follow the Fund’s fundamental investment objective—to track the Index—which
 18 objective served as the cornerstone of the Fund. Specifically, class-wide evidence will
 19 demonstrate the existence of the fundamental investment objectives binding on defendants and
 20 that defendants breached their fiduciary duties to the putative class members when they deviated
 21 from those stated fundamental investment objectives by investing in high risk CMOs, failed to
 22 track the Index, and maintained more than 25% of the Fund’s total assets in one industry. No
 23 individualized issues exist as to the fiduciary duty owed to the class members.

24 Third, common proof will demonstrate proximate cause. If defendants had followed the
 25 fundamental investment objectives of the Fund and not invested in CMOs in the manner and
 26 degree to which they did, the class members would not have sustained such considerable losses.
 27 See Kohlhagen Decl., ¶¶ 33-35.

28 Fourth and finally, the damages suffered by each member of the putative class are readily
 29 ascertainable by computing the differential between the Index and the performance of the Fund
 30 on a daily basis. See Kohlhagen Decl., ¶36; *Pulaski & Middleman, LLC*, 802 F.3d at 988,
 31 quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)
 32 (“[d]amages calculations alonecannot defeat certification...”). Of course, it is well-
 33 established that the fact that each class member did not suffer identical monetary damages is no

1 barrier to class certification. *See Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013)
 2 (individualized damages do not preclude class certification); *Troper*, 2014 U.S. Dist. LEXIS
 3 117453, at *34 (“differences in the amount of an individual class member’s damages do not
 4 defeat class certification”). Here by contrast, all class members, from a pro rata perspective,
 5 suffered identical damages due to the Fund’s deviation from the Index. No individualized
 6 damages inquiry is needed.

7 **2. A Class Action Is Superior to Other Available Methods for the Fair
 8 and Efficient Adjudication of Plaintiffs’ Claims**

9 A class action brought under Rule 23(b)(3) also must be “superior to other available
 10 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). To
 11 make this determination the Court considers: (1) the class members’ interests in individually
 12 controlling the prosecution or defense of separate actions; (2) the extent and nature of any
 13 litigation concerning the controversy already begun by or against class members; (3) the
 14 desirability or undesirability of concentrating the litigation of the claims in the particular
 15 forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-
 16 (D). The superiority requirement tests whether “classwide litigation of common issues will
 17 reduce litigation costs and promote greater efficiency.” *Valentino v. Carter-Wallace, Inc.*, 97
 18 F.3d 1227, 1234 (9th Cir. 1996). Each of these factors here strongly weighs in favor of class
 19 certification.

20 Plaintiffs are not aware of any member of the Class with an individual measure of
 21 damages that would justify an individual action. Nor do plaintiffs anticipate any difficulty in
 22 trying this case on a classwide basis since proof of liability is common to all class members.
 23 Defendants either did or did not exercise their fiduciary duties to cause the Fund to comply
 24 with its fundamental investment objectives.

25 The Court has entered a case management plan providing for the orderly progress of the
 26 case, which has already proceeded through motions to dismiss to the presently ongoing
 27 production of documents and interrogatory responses, and resolution of discovery disputes.
 28 Management of this case as a class action would not be so difficult as to render individual

1 actions a better alternative. This weighs in favor of class certification. *See* 1 William B.
 2 Rubenstein, NEWBERG ON CLASS ACTIONS § 4.32, at 4-130 to 4-131 (5th ed. 2011) (“As has
 3 been noted with the predominance test, Rule 23(b)(3) permits a class denial for lack of
 4 superiority only when other available methods for the fair and efficient adjudication of the
 5 controversy actually exist.”).

6 That this case is appropriate to proceed as a class action is also established by
 7 proceedings before the SEC with respect to the Bond Fund. Specifically, in January 2011, the
 8 SEC commenced an enforcement action against the Advisor, among other Schwab entities,
 9 with respect to Schwab’s YieldPlus and Total Bond Market investment funds. *See SEC v.*
 10 *Charles Schwab Inv. Mgmt.*, No. CV-11-0136 WHA (N.D. Cal.). That enforcement action
 11 related to the YieldPlus Fund’s concentration of more than 25% of its assets in CMOs. Though
 12 it did not contain any allegations with respect to the Bond Fund’s failure to adhere to its
 13 fundamental investment policy to track the Lehman Index, the SEC enforcement action
 14 included allegations similar to the ones plaintiffs assert here with respect to the Fund’s
 15 improper concentration of investments.

16 The SEC enforcement action was resolved on a class-wide basis with the Advisor and
 17 the funds’ underwriter (Charles Schwab & Co., Inc.) agreeing to disgorge and pay civil penalties
 18 of \$118.9 million for the benefit of investors in the YieldPlus and Index funds. *See Final*
 19 *Judgment, SEC YieldPlus Action* (Feb. 16, 2011), ECF No. 30. Under the Plan of Allocation
 20 approved by the District Court, Northstar’s clients and the class of Fund investors who held
 21 shares through March 31, 2008 received only a modest recovery (estimated at approximately
 22 13% of damages through March 31, 2008) from that settlement fund.⁸ *See Mot. for Approval of*
 23 *Distribution Plan, SEC YieldPlus Action* (May 2, 2011), ECF No. 30, and *Order Approving*
 24 *Distribution Plan with Modification* (June 7, 2011), ECF No. 37. Investors who continued to
 25 hold shares in the Fund subsequent to March 31, 2008 received no incremental recovery.

26
 27
 28 ⁸ For example, plaintiffs estimate that Odessa Hall incurred damages of approximately \$9,600
 from defendants’ misconduct, and recovered only approximately \$1,250 (or 13% of her
 damages) from the SEC disgorgement fund. *See* Hall Decl., ¶8.

1 Judge Alsup similarly granted class certification in the YieldPlus securities class action.
2 *See In re Charles Schwab Corp. Securities Litigation*, 09-cv-01510 (N.D. Cal.), Dkt Nos. 1102
3 and 1103.

4 That the *YieldPlus* and SEC enforcement action established class-wide settlements and
5 disgorgement funds for the benefit of the classes in those cases further evidences the
6 appropriateness of class certification in this action.

7 **CONCLUSION**

8 For the reasons stated herein, plaintiffs' motion for class certification should be granted.

9 Dated: January 21, 2016

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